

Rule 33. Post-Conviction Relief for a Defendant Who Pled Guilty or Admitted a Probation Violation

Rule 33.1. Scope of Remedy

Generally. A defendant may file a notice requesting post-conviction relief under this rule if the defendant pled guilty or no contest, admitted a probation violation, or had an automatic probation violation based on a plea of guilty or no contest.

To challenge the effectiveness of counsel in the first post-conviction proceeding, a defendant may file a second notice requesting post-conviction relief under this rule.

No Filing Fee. There is no fee for filing a notice of post-conviction relief.

Grounds for Relief. Grounds for relief are:

- (a) the defendant's plea or admission to a probation violation was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law or by the plea agreement;
- (d) the defendant continues to be or will continue to be in custody after his or her sentence expired;
- (e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:
 - (1) the facts were discovered after sentencing;
 - (2) the defendant exercised due diligence in discovering these facts; and
 - (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence.
- (f) the failure to timely file a notice of post-conviction relief was not the defendant's fault;
- (g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence; or

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(h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

COMMENT

Rule 33.1(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the United States or Arizona constitutions.

Rule 33.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of sentence credits that result in the defendant remaining in custody when he or she should be free. It is not intended to include challenges to the conditions of imprisonment or correctional practices.

Rule 33.1(h). This claim is independent of a claim under Rule 33.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 33.1(h).

Rule 33.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 33.1(a) based on any ground:

- (1) waived by pleading guilty to the offense;
- (2) finally adjudicated on the merits in any previous post-conviction proceeding;
- (3) waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded.

- (1) **Generally.** Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a). However, when a defendant raises a claim that falls under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any

time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

- (2) ***Ineffective Assistance of Post-Conviction Counsel.*** A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding.

[NEW] COMMENT TO RULE 33.2(a)(1)

A pleading defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the acceptance or validity of the plea. This provision is not intended to expand or contract what is waived by the entry of a plea under current case law.

Rule 33.3. Nature of a Post-Conviction Proceeding and Relation to Other Remedies

(a) Generally. A post-conviction proceeding is part of the original criminal action and is not a separate action. It replaces and incorporates all trial court post-plea remedies except those obtainable by Rule 24 motions and habeas corpus.

(b) Other Applications or Requests for Relief. If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant's plea or admission of a probation violation, or a sentence following entry of a plea or admission of a probation violation, it must treat the application as a petition for post-conviction relief. If that court is not the court that sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was sentenced.

COMMENT

This rule provides that all Rule 33 proceedings are to be treated as criminal actions. The characterization of the proceeding as criminal assures compensation for appointed counsel, and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing, except as otherwise provided.

Rule 33 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals who are unlawfully committed, detained, confined or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 33, the petition or application will be treated as a petition for post-conviction relief.

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This rule does not limit remedies that are available under Rule 24.

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

(a) Generally. A defendant starts a Rule 33 proceeding by filing a Notice Requesting Post-Conviction Relief.

(b) Notice Requesting Post-Conviction Relief.

- (1) *Where to File; Forms.*** The defendant must file a notice requesting post-conviction relief under Rule 33 in the court where the defendant was sentenced. The court must make "notice" forms available for defendants.
- (2) *Content of the Notice.*** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form ____.
- (3) *Time for Filing.***
 - (A) *Claims Under Rule 33.1(a).*** A defendant must file the notice for a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence.
 - (B) *Claims Under Rules 33.1(b) through (h).*** A defendant must file the notice for a claim under Rules 33.1(b) through (h) within a reasonable time after discovering the basis for the claim.
 - (C) *Successive Notice for Claims of Ineffective Assistance of Rule 33 counsel.*** A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding if the defendant files a notice no later than 30 days after the trial court's final order in the first post-conviction proceeding, or, if the defendant seeks appellate review of that order, no later than 30 days after the appellate court issues its mandate in that proceeding.
 - (D) *Excusing an Untimely Notice.*** The court must excuse an untimely notice of post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.
- (4) *Duty of the Clerk upon Receiving a Notice.***
 - (A) *Superior court.*** Upon receiving a notice, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defense counsel, the prosecuting attorney's

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office, and the Attorney General. The clerk must note in the record the date and manner of sending copies of the notice.

(B) *Justice or Municipal Court.* If the conviction occurred in a limited jurisdiction court, upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to defendant's counsel or the defendant, if self-represented. The clerk must note in the record the date and manner of sending copies of the notice.

(5) *Duty of the State upon Receiving a Notice.* Upon receiving a copy of a notice, the State must notify any victim who has requested notification of post-conviction proceedings.

PROPOSED COMMENT TO RULE 33.4(a)

A Notice of Post-Conviction Relief informs the trial court of a possible need to appoint an attorney for the defendant under Rule 33.5(a). The Notice of Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Rule 33.5. Appointment of Counsel

(a) *Generally.* No later than 15 days after the defendant has filed a timely or first notice under Rule 33.4, or a notice under Rule 33.4(b)(3)(C), the presiding judge must appoint counsel for the defendant if:

- (1)** the defendant requests it;
- (2)** the defendant is entitled to an appointed counsel under Rule 6.1(b); and
- (3)** there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency
- (4)** and the court finds that the defendant is indigent.

Upon filing of all other Rule 33 notices, the presiding judge may appoint counsel for an indigent defendant if requested.

(b) *Appointment of Investigators, Expert Witnesses, and Mitigation Specialists.* On application and if the trial court finds that such assistance is reasonably necessary for an indigent defendant, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7 at county expense.

(c) *Attorney-Client Privilege and Confidentiality for the Defendant.* The defendant's prior counsel must share all files and other communications with post-conviction

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counsel. This sharing of information does not waive the attorney-client privilege or confidentiality claims.

Rule 33.6. Duty of Counsel; Defendant's Pro Se Petition; Waiver of Attorney-Client Privilege

(a) Generally. In a Rule 33 proceeding, counsel must investigate the defendant's case for any colorable claims.

(b) Discovery.

(1) *After Filing a Notice.* After the filing of a notice, the court upon a showing of substantial need for the material or information to prepare the defendant's case may enter an order allowing discovery. To show substantial need, the defendant must demonstrate that the defendant cannot obtain the substantial equivalent by other means without undue hardship.

(2) *After Filing a Petition.* After the filing of a petition, the court may allow discovery for good cause. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

(c) Counsel's Notice of No Colorable Claims. If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant. The notice must include or list:

- (1)** a summary of the facts and procedural history of the case;
- (2)** the specific materials that counsel reviewed;
- (3)** the date counsel provided the record to the defendant, and the contents of that record;
- (4)** the dates counsel discussed the case with the defendant;
- (5)** the charges and allegations presented in the complaint, information, or indictment;

In the notice, counsel should also identify the following:

- (6)** any potential errors related to the entry of the plea for which there were no objections, but which might rise to the level of fundamental error;
- (7)** any determination of the defendant's competency that was raised prior to sentencing;

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- (8) any objections raised at the time of sentencing;
- (9) the court's determination of the classification and category of offenses for which the defendant was sentenced under the plea agreement;
- (10) the court's determination of pre-sentence incarceration credit;
- (11) the sentence imposed by the court; and
- (12) any potential claims of ineffective assistance of counsel.

A notice of no colorable claims must also include or incorporate Form ___, with citations to the pertinent portions of the record.

(d) Defendant's Pro Se Petition. Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

(e) Counsel's Duties After Filing a Notice Under Section (c). After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.

(f) Attorney-Client Privilege. By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

PROPOSED COMMENT TO RULE 33.6(c)

Rule 33.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form ___, or identify any issues listed in Rules 33.6(c) does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 33.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

- (1) ***Defendant with Counsel.*** Appointed counsel must file a petition no later than 60 days after the date of appointment.
- (2) ***Self-Represented Defendant.*** A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

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- (3) **Time Extensions.** For good cause and after considering the rights of the victim, the court may grant a defendant a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.
- (b) **Form of Petition.** A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.
- (c) **Length of Petition.** The petition must not exceed 28 pages.
- (d) **Declaration.** A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.
- (e) **Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.
- (f) **Effects of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 33.8. Transcription Preparation

- (a) **Request for Transcripts.** If the trial court proceedings were not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.
- (b) **Orders Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant has specified in the notice.
- (c) **Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no

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later than 60 days after the entry of an order granting the defendant's request for transcripts.

(d) Cost. If the defendant is indigent, the transcripts must be prepared at county expense.

(e) Unavailability of Transcripts. If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

(1) *Deadlines.* The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.

(2) *Contents.* The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.

(c) Length of Response and Reply. The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.

(d) Amending the Petition. After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 33.10. Assignment of a Judge

(a) Generally. The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.

(b) Dispute Regarding Public Records. The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, which concerns access to public records requested for a post-conviction proceeding.

Rule 33.11. Court Review of the Petition, Response, and Reply; Further Proceedings

- (a) Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.
- (b) Setting a Hearing.** If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.
- (c) Notice to the Victim.** If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.
- (d) Defendant's Competence.** The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 33.12. Informal Conference

- (a) Generally.** At any time, the court may hold an informal conference to expedite a proceeding for post-conviction relief.
- (b) The Defendant's Presence.** The defendant need not be present at an informal conference if defense counsel is present.

Rule 33.13. Evidentiary Hearing

- (a) Generally.** The defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses for the hearing. The court may order the hearing to be held at the defendant's place of confinement if facilities are available and after giving at least 15 days' notice to the officer in charge of the confinement facility. In superior court proceedings, the court must make a verbatim record.
- (b) Evidence.** The Arizona Rules of Evidence applicable to criminal proceedings apply at the hearing, except that the defendant may be called to testify.
- (c) Burden of Proof.** The defendant has the burden of proving factual allegations by a preponderance of the evidence. If the defendant proves a constitutional violation, the State has the burden of proving beyond a reasonable doubt that the violation was harmless.
- (d) Decision.**
 - (1) Findings and Conclusions.** The court must make specific findings of fact and expressly state its conclusions of law relating to each issue presented.

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(2) ***Decision in the Defendant's Favor.*** If the court finds in the defendant's favor, it must enter appropriate orders concerning:

(A) the conviction, sentence, or detention;

(B) any further proceedings, including setting the matter for trial and conditions of release; and

(C) other matters that may be necessary and proper.

(e) **Transcript.** On a party's request, the court must order the preparation of a certified transcript of the evidentiary hearing. The request must be made within the time allowed for filing a petition for review. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.

Rule 33.14. Motion for Rehearing

(a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

(b) **Response and Reply.** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.

(c) **Stay.** The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court.

(d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 33.16.

(e) **Disposition if Motion Granted.** If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. In either case, it must state its reasons for amending a previous ruling. The State must notify the victim of any action taken by the court if the victim has requested notification.

Rule 33.15. Notification to the Appellate Court

If a petition for review of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file in the appellate court a notice of any relief granted or denied by the trial court.

Rule 33.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

- (1) ***Petition.*** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, or the dismissal of a notice, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) ***Cross-Petition.*** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) ***Place for Filing.*** The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.
- (4) ***Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.*** A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly. If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or cross-petitioner must file with the trial court a "notice of filing." The notice of filing may designate additional items for the record described in section (i). These items may include additional certified transcripts of trial court proceedings prepared under Rule 33.13(e), or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

(c) Form and Contents of a Petition or Cross-Petition for Review.

- (1) ***Form and Length.*** Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed

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6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

(2) *Contents.* A petition or cross-petition for review must contain:

- (A)** copies of the trial court's rulings entered under Rules 33.2, 33.11, 33.13, and 33.14;
- (B)** a statement of issues the trial court decided that the defendant is presenting for appellate review;
- (C)** a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
- (D)** reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

(3) *Effect of a Motion Rehearing.* The filing of a motion for rehearing under Rule 33.14 does not limit the issues a party may raise in a petition or cross-petition for review.

(4) *Waiver.* A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.

(d) *Appendix Accompanying a Petition or Cross-Petition.* Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

(e) *Service of a Petition for Review, Cross-Petition for Review, Reply, or Related Filing.* A party filing a petition, cross-petition, appendix, response, or reply, or another filing, must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule 1.7(c)(3), identifying who was served and the date and manner of service.

(f) *Response to a Petition or Cross-Petition for Review; Reply.*

(1) *Time and Place for Filing a Response; Extensions of Time.*

- (A)** No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate

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court. Rule 31.3(d) governs computation of the deadline for filing the response.

(B) A party may file a motion with the appellate court for an extension of the time to file a response or reply in accordance with Rule 31.3(e).

(2) *Form and Length of Response.* The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in subpart (c)(1) An appendix to a response must comply with the form and substantive requirements in section (d).

(3) *Reply.* No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(2) and may not include an appendix.

(g) *Computing and Modifying Appellate Court Deadlines.* Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule. An appellate court may modify any deadline in accordance with Rule 31.3(e).

(h) *Amicus Curiae.* Rules 31.13(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.

(i) *Stay Pending Appellate Review.* The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court.

(j) *Transmitting the Record to the Appellate Court.* No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record. The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).

(k) *Disposition.* The appellate court may grant review of the petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.

(l) *Reconsideration or Review of an Appellate Court Decision.* The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for

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review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).

- (m) Return of the Record.** After a petition for review is resolved, the appellate clerk must return the record to the trial court clerk.
- (n) Notice to the Victim.** Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

- (a) Generally.** Any person who has been convicted and sentenced for a felony offense may petition the court at any time for forensic deoxyribonucleic acid (DNA) testing of any evidence:
 - (1)** in the possession or control of the court or the State;
 - (2)** related to the investigation or prosecution that resulted in the judgment of conviction; and
 - (3)** that may contain biological evidence.
- (b) Manner of Filing; Response.** The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 33.4(b)(4). The State must respond to the petition no later than 45 days after it is served.
- (c) Appointment of Counsel.** The court may appoint counsel for an indigent defendant at any time during proceedings under this rule.
- (d) Court Orders.**
 - (1) DNA Testing.** After considering the petition and the State's response, the court must order DNA testing if the court finds that:
 - (A)** a reasonable probability exists that the defendant would not have been prosecuted, or the defendant's verdict or sentence would have been more favorable if DNA testing would produce exculpatory evidence;
 - (B)** the evidence is still in existence; and
 - (C)** the evidence was not previously subjected to DNA testing, or the evidence was not subjected to the type of DNA testing that defendant now requests and the requested testing may resolve an issue not resolved by previous testing.

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- (2) **Laboratory; Costs.** If the court orders testing, the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing.
- (3) **Other Orders.** The court may enter any other appropriate orders, including orders requiring elimination samples from third parties and designating:
 - (A) the type of DNA analysis to be used;
 - (B) the procedures to be followed during the testing; and
 - (C) the preservation of some of the sample for replicating the testing.

(e) Test Results.

- (1) **Earlier Testing.** If the State or defense counsel has previously subjected evidence to DNA testing, the court may order the party to provide all other parties and the court with access to the laboratory reports prepared in connection with that testing, including underlying data and laboratory notes.
- (2) **Testing Under this Rule.** If the court orders DNA testing under this rule, the court must order the production to all parties of any laboratory reports prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

(f) Preservation of Evidence. If a defendant files a petition under this rule, the court must order the State to preserve during the pendency of the proceeding all evidence in the State's possession or control that could be subjected to DNA testing. The State must prepare an inventory of the evidence and submit a copy of the inventory to the defendant and the court. If evidence is destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt, for a knowing violation.

(g) Unfavorable Test Results. If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a hearing any DNA-related claims asserted under Rule 32.1 or Rule 33.1. The court may make further orders as it deems appropriate, including orders:

- (1) notifying the Board of Executive Clemency or a probation department;
- (2) requesting to add the defendant's sample to the federal combined DNA index system offender database; or
- (3) notifying the victim or the victim's family.

(h) Favorable Test Results. Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule 33.1 as a matter of law.